SUPREME COURT, U. S.

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MICHAEL R.JDAK

Nos. 73-1772, 73-1776, 73-1790, 73-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. de C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION IN OPPOSITION

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June, 1974

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JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The petitions for a writ of certiorari in Nos. 73-1772, 73-1776, 73-1790 and 73-1825 were filed on May 24, 1974, May 28, 1974, May

29, 1974 and June 3, 1974 respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the National Gas Act, 15 U.S.C. § 717r(b). Because the petitions in Nos. 73-1790 and 73-1825 were not filed within the time specified in 28 U.S.C. § 2101(c), those petitions are jurisdictionaly defective.

QUESTIONS PRESENTED

1. Whether issues raised by interim curtailment orders issued by the Federal Power Commission and soon to be replaced by permanent orders are moot.

2. Whether the Federal Power Commission acted properly in prescribing a non-discriminatory interim curtailment plan to be observed by El Paso Natural Gas Company after finding that El Paso's then effective plan was discriminatory.

3. Whether the Federal Power Commission was required to issue an Environmental Impact Statement before responding to the imminent emergency on El Paso Natural Gas Company's system.

STATEMENT

El Paso Natural Gas Company is a natural gas company subject to the jurisdiction of the Federal Power Commission. El Paso's Southern Division System, which extends from Texas to the Eastern borders of California, supplies all the natural gas requirements of several distributor and direct industrial customers located in the States of Texas, New Mexico, Arizona and Nevada and a portion of the requirements of two California distributors, Pacific Gas

and Electric Company (PG&E) and Southern California Gas Company (SoCal), which in turn sell gas for residential, commercial and industrial use.

The East of California direct industrial customers include respondents American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation (ASARCO, *et al.*), which are generally engaged in the mining and smelting of copper ores in the States of Texas, New Mexico and Arizona and in Northern Mexico. ASARCO, *et al.*, have purchased their natural gas requirements from El Paso since the 1940's pursuant to long term firm contracts requiring El Paso to deliver the smelters' natural gas requirements up to certain specified daily amounts. The operations of these companies contribute significantly to the economy of the Southwestern United States and Northern Mexico.

Pursuant to Commission Order No. 431, 36 Fed. Reg. 7505, El Paso filed in May, 1971, proposed changes in the curtailment procedures set forth in its FPC Gas Tariff. Hearings were ordered by the Commission on the proposed changes and were completed in June, 1972. In August, 1972, while the matter was being briefed to the presiding Administrative Law Judge, El Paso, anticipating a need to impose service curtailments beginning November 1, 1972, but not wanting to do so pursuant to either its existing procedures or its proposed revisions—at least before they were sanctioned by the Commission—requested the Commission to prescribe interim procedures to govern curtailments on its Southern Division System until a permanent plan was settled on.

Hearings were reconvened on the need for and the form of interim curtailment procedures. Following briefing, the Commission issued Opinion No. 634, 48 F.P.C. 931 (1972), which found, initially, that El Paso's existing procedures required that curtailments be imposed in the following order:

> "(a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G." 48 F.P.C. at 934.

The Commission concluded that this curtailed scheme [1] was unlawful and ordered El Paso, pending approval of a permanent plan, to curtail gas deliveries ratably to all its customers on the basis of the following end use priorities, with the lowest priority to be curtailed first:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feedstock and process needs.

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[1] While ASARCO, *et al.*, do not agree with the Commission's interpretation of the prior procedures, the Commission acted properly on that interpretation, and therefore the result reached was correctly affirmed by the Court of Appeals. For this reason, among others, ASARCO, *et al.*, oppose the untimely petition filed by the City of Willcox and the Arizona Electric Power Cooperative, Inc.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day, but more than 1,500 Mcf per day) where existing alternate fuel capability is present. 48 F.P.C. at 939.

After the Commission denied rehearing, 48 F.P.C. 1369, several parties initiated review proceedings in the Court of Appeals.

Although it remanded certain specific features of the interim program to the Commission, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's conclusion that El Paso's existing procedures were unlawful and upheld the Commission's authority to prescribe end use curtailment priorities to be applied ratably to all customers of the pipeline. Several petitions for rehearing were denied and petitions by PG&E, SoCal and San Diego Gas & Electric Company, a customer of SoCal (the California petitioners), and by the City of Willcox and Arizona Electric Power Cooperative, Inc. (AEPCO), followed.

ARGUMENT

A. The Petitions Raise Issues Which Will Be Mooted in the Near Future.

The petitions concern Commission orders which specifically are to remain in effect only until such time as a permanent curtailment plan is prescribed by the

Commission. On June 14, 1974, the Commission issued its Opinion No. 697, prescribing a *permanent* curtailment plan to be followed by El Paso. Pursuant to Ordering Paragraph I, Opinion No. 697 will become effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." Issues raised by the interim plan will thus be mooted in the very near future, and the petitions should accordingly be dismissed when Opinion No. 697 becomes effective. *De Funis* v. *Odegaard*, — U.S. —, 42 U.S.L.W. 4578 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). If the permanent curtailment plan contains features which petitioners deem unsatisfactory, they may seek judicial review thereof pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

B. In Upholding the Commission's Interim Orders, the Court of Appeals Did Not Deviate From This Court's Decisions.

In upholding the Commission's action, the Court of Appeals did not deviate at all from the decisions of this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621; *Permian Basin Area Rate Cases*, 390 U.S. 747 (1969); or *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1955), concerning the Commission's obligations in curtailment proceedings or its duty to set asde contractual provisions inimical to the public interest. Neither does the Court of Appeals' decision create a conflict with another circuit, as some petitioners suggest. Accordingly, the several petitions should be denied.

In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that Sections 1(b) and 16

of the Natural Gas Act, 15 U.S.C. §§ 717(b) and 717o, conferred on the Commission broad authority to regulate service curtailments by pipelines subject to its jurisdiction. *Id.* at 638, 642. The substantive standard for evaluating curtailment programs, it was held, was Section 4(b), which provides:

> "(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

Also important to this case is Section 5(a) of the Act, which was invoked by El Paso's August, 1972, motion and provides in relevant part as follows:

> "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: . . ."

The California petitioners do not seriously contend that the Commission erred in concluding that El Paso's existing curtailment procedures were unlawfully discriminatory.[2] Nor do they argue that the interim non-discriminatory pro rata curtailment procedures promulgated by the Commission are violative of Section 4(b). For neither of these positions would be supportable in fact or in law.

What the California petitioners do urge, however, is that the Commission went too far in remedying the undue discrimination embodied in El Paso's existing curtailment procedures. After assuring that gas service to EOC residential and commercial customers would be given the same priority as similar service in California, they say, the Commission should simply have let El Paso curtail industrial service in accordance with its existing procedures. Under El Paso's and the Commission's interpretation of those procedures,[3] all service to East of California direct industrials would have been curtailed for much of the 1972-

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[2] SoCal argues that the Commission's findings that there was a substantial likelihood that curtailment of EOC residential or commercial requirements would occur was not supported by the evidence. SoCal's position rests solely on El Paso's estimate of *average* day, rather than *peak* day, curtailments of EOC residential or commercial requirements. El Paso's evidence was that on extremely cold days, which might occur for four or five consecutive days, there would be curtailment of 226,000 Mcf of residential-commercial service. (R. 6698; 9561.) While the Court of Appeals noted that there was no certainty that this would result in curtailment of residential service, it affirmed, as supported by substantial evidence, the Commission's conclusion that residential and commercial service together would be curtailed on very cold days. (Slip Op. at 25-28.)

[3] But see note 1 *supra*.

73 winter (and undoubtedly to an even greater extent in the 1973-74 winter), while industrials served by EOC distributors would have fared only slightly better. (R. 9561.) At the same time, PG&E and SoCal would have received, day after day, one-hundred percent of their contract entitlement, much of which would have been sold to industrial users. In short, the California petitioners were advocating disparate treatment by El Paso which would have favored its California indirect industrial customers at the expense of its East of California direct customers.

The complete answer to the position asserted by the California petitioners is that the Commission had an obligation to prescribe a nondiscriminatory curtailment plan for El Paso, not merely one which eliminated only the most objectionable features of the existing plan, *i.e.,* potential curtailment of EOC residential and commercial service before El Paso's deliveries to PG&E and SoCal were cut by 1 Mcf.[4] Section 5(a), which the Court has held may be used to implement the Commission's curtailment authority, *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 643, provides that after the Commission finds an existing tariff provision unlawful, it "shall determine the *just and reasonable* . . . rule, regulation, practice, or contract to be thereafter observed and shall fix the same by order . . ." (Emphasis added.) And, of course, in prescribing the plan, the Commission had to observe

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[4] In addition to their grave concern regarding predicted curtailment of EOC residential-commercial service, the Commission and the Court of Appeals plainly considered the discriminatory, complete curtailment of gas deliveries to EOC industry to be a significant indication of the unlawfulness of El Paso's existing procedures. (48 F.P.C. at 934-35; Slip Op. at 28.)

the nondiscrimination requirements of Section 4(b). *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 642-43. In view of these governing criteria, it is readily apparent that the Commission did not act unlawfully in prescribing an end use curtailment plan which accorded similar treatment to all of El Paso's customers. Indeed, one wonders what other lawful order the Commission could have entered under the relevant statutory and case law.

The California petitioners' characterization of the Commission's action as (1) unjustifiably upsetting their contractual expectations of a firm gas supply and (2) unexpectedly shifting volumes of gas from industrial users in California to similar users in states East of California is simply inflammatory rhetoric which does not advance analysis of the issues. The EOC direct industrials, such as *ASARCO, et al.,* enjoy, under their contracts with El Paso, service which is no less firm than El Paso's gas service to PG&E and SoCal. The only difference is the not unusual provision, that being industrials, ASARCO, *et al.,* could be interrupted in emergency situations *to ensure continued service to the "domestic" customers served by El Paso's distributor customers.* (*E.g.* R. 10725-26, 10761-62, 10888-89, 10941-42). ASARCO, *et al.'s* contracts do *not* provide that service to them can be cut off permanently merely to ensure continued gas deliveries to PG&E and SoCal for redelivery to their large steam electric generating plant customers.

The hard fact is that the severe and worsening natural gas shortage currently affecting the United States as a whole and El Paso in particular has resulted in the frustration of the contractual expecta-

tions of all of El Paso's firm customers, whether located in California or in States to the East. Those customers, including ASARCO, *et al.*, had relied on a continuing adequate supply of gas from El Paso in making plans, commitments and capital investments. That El Paso's gas shortage has demonstrated that such reliance was unjustified is hardly a sufficient reason for adopting the California petitioners' suggestion that the entire burden of the shortage be borne by EOC customers.[5]

It was the Commission's unenviable task to devise in a short time interim procedures which would spread the shortfall between supply and demand in a nondiscriminatory and nonpreferential manner. In issuing its Orders designed to accomplish this goal, the Commission did not set aside the California petitioners' contractual expectations to any greater degree than it did those of the EOC customers and did not, as the California petitioners urge, shift volumes of gas from California to the East. Rather, the Commission simply ordered that El Paso's systemwide shortage be apportioned ratably among those served by that system, and, as a result, *all* customers are receiving *less* gas than they are contractually entitled to.

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[5] Even assuming the validity of El Paso's view of its existing procedures (although El Paso historically had not acted in accordance with that view), the procedures were not in conformity with the contract rights of ASARCO, *et al.* In any event, curtailment procedures historically utilized only during severe winter weather conditions when El Paso's pipeline capacity was insufficient to satisfy all of its customers' contract entitlements were hardly dispositive when the Commission undertook to devise procedures for dealing with severe daily curtailments resulting from a chronic gas supply shortage.

In view of the foregoing, it is plain that the Commission did not deal any differently with the California petitioners' contract rights than it did with those of, for instance, ASARCO, *et al.* In any event, the Commission certainly has the inherent authority to set aside, in connection with the exercise of its curtailment authority, contractual provisions subject to its jurisdiction which it finds are not in the public interest. *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 646; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* 350 U.S. at 344; *Permian Basin Area Rate Cases, supra,* 390 U.S. at 784. Utilizing these standards, it was entirely appropriate for the Commission to set aside the contracts between El Paso and PG&E and SoCal to whatever extent they may have provided that gas would be delivered to PG&E and SoCal for resale to industrial consumers while deliveries to the firm EOC industrials were being curtailed. Such an arrangement, which would result in gross discrimination between deliveries by El Paso for industrial gas consumers in California and States East of California, is clearly contrary to the public interest, especially in a time of acute gas shortage like that currently being experienced by El Paso's Southern Division System. In sum, one group of a pipeline's customers cannot be heard to invoke certainty of contract as a vehicle for preserving its own contract rights at the expense of those of another similarly situated group of customers.

C. The Court of Appeals' Decision Is Not in Conflict with International Paper Company v. Federal Power Commission.

The decision of the Court of Appeals is not in conflict with that of the Court of Appeals for the Fifth Circuit in *International Paper Co.* v. *FPC,* 476 F.2d

121 (5th Cir. 1973). In that case, the court accepted as settled that a valid Commission curtailment order would, in and of itself, override and limit pro tanto the pipeline's contractual obligation to deliver so many cubic feet of gas per day. 476 F.2d at 123. Indeed, an impossible situation would result if this effect were not given Commission curtailment orders.

The Fifth Circuit then considered whether such an order would also automatically insulate the pipeline from all potential damage liability, either for failure to deliver the agreed upon quantities, or under substitute fuel clauses. It was only in connection with these latter issues, which were not raised in the proceedings below, that the Fifth Circuit required the specific findings which some petitioners suggest the Commission was required to make in this case.

Both the Fifth Circuit[6] and the D.C. Circuit[7] recognized the difference between the curtailment and damages issues, and the D.C. Circuit properly concluded that the Commission had not acted contrary to the *International Paper* decision.

In any event, the Commission has plainly made any findings arguably required by *International Paper*. The Commission found, based on substantial evidence, that El Paso's existing curtailment plan was unduly discriminatory (the converse of preferential) and that the curtailments required thereby (*i.e.*, cessation of *all* natural gas service East of California before 1 Mcf of curtailment to PG&E or SoCal) made abrogation

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[6] 476 F. 2d at 126-29.

[7] Slip Op. at 20-21.

of that plan necessary in the public interest. For these reasons, the decision below has created no conflict between circuits.

D. In the Circumstances Facing It, the Commission Was Not Required To Issue an Environmental Impact Statement.

Review should not be granted merely because the Court of Appeals upheld the Commission's decision to promulgate interim curtailment procedures without first issuing an Environmental Impact Statement or stating why it was impractical to do so. While ASARCO, *et al.*, believe that the National Environmental Policy Act, 42 U.S. § 4321 *et seq.*, requires the Commission to issue such a statement or explanation in conjunction with a *permanent* curtailment plan, the circumstances underlying the issuance of the *interim* plan—the need for expeditious action to ensure that anticipated service curtailments would be administered in a just and reasonable manner—simply precluded the Commission from considering the environmental issue beyond providing for an exemption from curtailment in environmental emergencies. A system shortage was about to materialize and the Commission could have done nothing to stave it off while it considered environmental matters. In these circumstances, the Court of Appeals properly concluded that the Commission was temporarily excused from complying with NEPA, which requires that, "to the fullest extent *possible*," [8] impact statements will be issued. *See also Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 150 (5th Cir. 1973).

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[8] 42 U.S.C. § 4332(2)(c) (emphasis added).

CONCLUSION

For the foregoing reasons, the several petitions for writs of certiorari should be denied.

Respectfully submitted,

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